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No. 634

In the Supreme Court of the United States

OCTOBER TERM, 1931

THE TEXAS & PACIFIC RAILWAY COMPANY,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

We do not oppose the instant petition.

OPINION BELOW

The opinion of the Court of Claims (R. 13) is reported in 52 F. (2d) 1040.

JURISDICTION

The judgment sought to be reviewed was entered on October 20, 1931. (R. 17.) The petition for certiorari was filed on January 14, 1932. (R. 18.) The jurisdiction of this Court is evidently invoked under Section 3(b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether a sum paid to the petitioner by the Government as the guaranty of its railway operating income for the period of six months beginning March 1, 1920, pursuant to a certificate of the Interstate Commerce Commission, issued under Section 209 of the Transportation Act of 1920, was taxable income.

STATUTES INVOLVED

These are set forth in the Appendix, *infra*, pp. 4–6.

STATEMENT

The findings of the Court of Claims (R. 9–12) applicable to the point to which the instant petition relates may be abridged as follows:

The railway properties of the petitioner were operated by a receiver during the six months beginning March 1, 1920. (R. 9.) The petitioner accepted the provisions of Section 209 of the Transportation Act of 1920, and received for the period of six months beginning March 1, 1920, an allowance by the Interstate Commerce Commission representing the amount necessary to make good the guaranty under Section 209 in the sum of $2,043,041.77 and one of its subsidiaries received $18,040.86 under the same section. (R. 9.)

The petitioner and this subsidiary filed separate returns for income and excess profits for the year 1920. The Commissioner of Internal Revenue audited these returns and held that the subsidiary

company referred to and another company were affiliated with petitioner for 1920, and consolidated them for the purpose of the determination of their tax liability. (R. 10.) The consolidated net income of the petitioner and its subsidiaries, as finally determined by the Commissioner, included the allowances under Section 209 of the Transportation Act of 1920, which the taxpayers had not included in their original returns. The petitioner paid the amount assessed, based upon such determination; duly filed a claim for refund; and after it was rejected sued the United States in the Court of Claims. The Court of Claims decided in favor of the Government in respect of this item.

DISCUSSION

On account of the importance of this question and the large number of cases involving it which are pending, the Government does not oppose this petition. See memorandum for the United States in *Continental Tie & Lumber Co.* v. *United States*, No. 560.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
CLAUDE R. BRANCH,
Special Assistant to the Attorney General.

JANUARY, 1932.

APPENDIX

STATUTES INVOLVED

Transportation Act, 1920, c. 91, 41 Stat. 456, 464:

SEC. 209 (a). When used in this section—

The term "carrier" means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under Federal control; and (2) a sleeping-car company whose system of transportation is under Federal control at the time Federal control terminates; but does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both;

The term "guaranty period" means the six months beginning March 1, 1920.

The term "test period" means the three years ending June 30, 1917; and

The term "railway operating income" and other references to accounts of carriers by railroad shall, in the case of a sleeping-car company, be construed as indicating the appropriate corresponding accounts in the accounting system prescribed by the Commission.

(b) This section shall not be applicable to any carrier which does not on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this section.

(c) The United States hereby guarantees—

(1) With respect to any carrier with which a contract (exclusive of so-called co-operative contracts or waivers) has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the amount named in such contract as annual compensation, or, where the contract fixed a lump sum as compensation for the whole period of Federal operation, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than an amount which shall bear the same proportion to the lump sum so fixed as six months bears to the number of months during which such carrier was under Federal operation, including in both cases the increases in such compensation provided for in section 4 of the Federal Control Act;

* * * * *

(d) If for the guaranty period as a whole the railway operating income of any carrier entitled to a guaranty under paragraph (1), (2), or (4) of subdivision (c) is in excess of the minimum railway operating income guaranteed in such paragraph, such carrier shall forthwith pay the amount of such excess into the Treasury of the United States. If for the guaranty period as a whole the railway operating income of any carrier entitled to a guaranty under paragraph (3)

of subdivision (c) is in excess of one-half of the annual sum fixed by the President with respect to such carrier under section 4 of the Federal Control Act, such carrier shall forthwith pay the amount of such excess into the Treasury of the United States. The amounts so paid into the Treasury of the United States shall be added to the funds made available under section 202 for the purposes indicated in such section. Notwithstanding the provisions of this subdivision, any carrier may retain out of any such excess any amount necessary to enable it to pay its fixed charges accruing during the guaranty period.

* * * * * *

(g) The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

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